

STATE OF MICHIGAN
COURT OF APPEALS

FREDERICK F. FRITZ and JAMES T.
OTENBAKER,

UNPUBLISHED
June 3, 2003

Plaintiffs-Appellees,

v

DELFIELD COMPANY,

No. 238630
Isabella Circuit Court
LC No. 00-001582-CZ

Defendant-Appellant.

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

Defendant appeals an order that denied its motion for summary disposition under MCR 2.116(C)(7) and an order that granted plaintiffs' motion for summary disposition under MCR 2.116(C)(10).¹ We reverse in part and remand for further proceedings consistent with this opinion.

I. Nature of the Case

In this breach of contract action, plaintiffs seek to recover certain "royalty" payments from defendant for the sale of defendant's products containing plaintiffs' inventions. In a prior case involving the same contract and the same parties,² plaintiffs also alleged that defendant owed continued payments for the inventions. The parties submitted the prior case to mediation,³ the parties accepted the mediation award, and the trial court dismissed the case with prejudice. Plaintiffs then filed this action and asserted that the earlier mediation award did not include their right to future payments under the contract. However, because the issue of future payments was or could have been resolved in the first case, we hold that this action is barred by the doctrine of res judicata and that the trial court should have dismissed the case under MCR 2.116(C)(7).

¹ On December 3, 2001, the trial court entered a final judgment which disposed of all claims among the parties.

² In the first action, plaintiffs also sued defendant's parent company, Scotsman Industries, Inc.; the record reflects that plaintiffs ultimately dismissed the claims against Scotsman.

³ The mediation process is now called "case evaluation" under MCR 2.403.

II. Facts and Procedural History

Defendant manufactures commercial kitchen equipment and plaintiffs invented certain ventilation products for use in commercial kitchen equipment. On October 26, 1982, defendant, through its predecessor company, entered a contract with plaintiffs to buy certain assets of plaintiffs' companies, Oxford Air Systems, Inc. and Oxford Air Products, Inc. Among other provisions, the agreement provides that defendant shall pay "\$44,369.53 for U.S. Patent No. 4,232,373, and thereafter a royalty for a term ending on the expiration of the said patent for air systems manufactured and sold by [defendant] based upon the net sales prices of that part of the system incorporating the said invention." Further, the agreement provides that defendant would pay plaintiffs "a royalty for a term ending on the later of the expiration of U.S. Patent No. 4,134,394 or any patent to issue pursuant to the new developments described on Exhibit 'A' for air systems manufactured and sold by [defendant] based upon the net sales price of that part of the system incorporating the said invention"

The parties disagree on the effect of the latter provision regarding compensation for plaintiff's patented inventions. Defendant argues that, under the contract, it was not obligated to make any "royalty" payments after patent 4,134,394 ("394") expired in February 1997. In contrast, plaintiff says that the contract requires defendant to continue to make payments until the last patent issued for "new developments" expires, on October 11, 2003.

Consistent with its interpretation of its obligations under the contract, defendant stopped making payments in February 1997. On February 23, 1998, plaintiffs filed a complaint against defendant in Isabella Circuit Court, LC No. 98-01060-CZ. The complaint contained two counts of breach of contract and other claims. The case was mediated on July 22, 1999, and both parties accepted the evaluation of \$250,000 for plaintiffs. Defendant paid out the award but, before the trial court entered the order of dismissal, a disagreement arose regarding the scope of the award. Specifically, plaintiffs argued that they accepted the award with the understanding that it covered past damages only, from February 1997 through April 1999, and that the acceptance should not preclude plaintiffs from collecting payments for May 1999 to October 2003, when the final patent expires. In response, defendant maintained that the mediation award applied to all monies owed under the contract, past and future. On November 10, 1999, the trial court entered an opinion and order dismissing the case with prejudice under MCR 2.403(M)(1) because both parties agreed to the mediation evaluation.

Defendant made no further payments to plaintiffs and, on January 4, 2000, plaintiffs filed another complaint in Isabella Circuit Court and alleged that defendant again breached the 1982 contract by failing to make royalty payments through October 11, 2003. Plaintiffs sought to recover money owed under the contract and a declaratory judgment that defendant is obligated to make payments until October 11, 2003.

On February 3, 2000, defendant filed a motion for summary disposition under MCR 2.116(C)(7) and argued that plaintiffs' claims are barred by res judicata. On May 22, 2000, the trial court entered an opinion and order denying defendant's motion. Thereafter, plaintiffs filed a motion for summary disposition under MCR 2.116(C)(10) and requested a declaratory judgment that defendant must continue to make payments for all of the disputed patents until October 2003. The trial court agreed, granted plaintiffs' motion and awarded plaintiffs \$212,537.21 for

past damages from May 1, 1999 to September 30, 2001. The trial court also ordered defendant to make payments under the contract until October 11, 2003.

II. Analysis

A. Standard of Review and Applicable Law

Defendant argues that the trial court erred by denying its motion under MCR 2.116(C)(7) because plaintiffs' claims are barred by res judicata. We agree. As this Court explained in *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2002):

This Court reviews a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. The applicability of the doctrine of res judicata is a question of law that is also reviewed de novo. [Citations omitted.]

"Res judicata bars relitigation of claims that are based on the same transaction or events as a prior suit." *Id.* at 334. As this Court opined in *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001):

Res judicata relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and encourages reliance on adjudication. Res judicata applies when (1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. [Citations omitted.]

As noted, both parties accepted the \$250,000 mediation evaluation in the prior lawsuit and the trial court dismissed the case with prejudice under MCR 2.403(M)(1). The parties do not dispute that this action involves the same parties as the prior lawsuit or that the prior decision was final. Further, though they disputed the issue below, plaintiffs have abandoned their argument that the prior judgment was not a decision on the merits. Accordingly, the primary issue is whether "the matter in the second case was or could have been resolved in the first." *Ditmore, supra* at 576.

B. Allegations in the Complaints

Defendant asserts that plaintiffs sought future damages under the contract in the first lawsuit. In their first complaint, plaintiffs alleged that the parties contracted for payments to continue for twenty-one years, but that defendant stopped paying under the contract after fifteen years. Plaintiffs also alleged that, because the agreement provides that defendant shall make payments until the later of two dates (the expiration of patent 394 or the expiration of the patent issued pursuant to the "new developments"), defendant's payment obligation was extended to October 11, 2003. The crux of the complaint in the first lawsuit is that defendant ceased making any payments to plaintiffs on February 24, 1997, though defendant was obligated to make payments until October 11, 2003. Similarly, in the instant complaint, plaintiffs again assert that

defendant is obligated to continue making payments under the contract until October 11, 2003, but that defendant stopped making payments in February 1997.

Though there are differences between the two complaints, these differences do not alter the fact that both lawsuits involve the same issue.⁴ Indeed, the core allegation in both complaints is the same: Defendant stopped paying on the contract when it should have continued paying until October 2003. Thus, plaintiffs' first and second complaints make the same allegations regarding defendant's alleged breach of contract. We reject plaintiffs' argument that the complaints fundamentally differ because plaintiffs specifically sought past damages in the first complaint and future damages in the second complaint because, notwithstanding this argument, both complaints repeatedly state that plaintiffs are entitled to payments through October 2003.

Moreover, plaintiffs clearly *could have* asserted a claim for continued payments in their first complaint, as they did in the instant matter. Plaintiffs assert that, only in the second complaint did they ask the trial court to define their rights under the agreement and enter an order declaring that defendant must continue paying on the contract until October 2003. However, while plaintiffs maintain that they were not "obligated" to ask for a declaratory judgment in the first action, because they asserted the identical claim in the first action (that defendant must pay under the contract until October 2003), plaintiffs clearly *could have* requested a judgment of their rights, particularly because the issue arose before the final judgment was entered. As our Supreme Court observed in *Sewell v Clean Cut Management, Inc.*, 463 Mich 569, 575; 621 NW2d 222 (2001):

Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, *could have raised but did not*. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). [Emphasis added.]

Indeed, the broad view of res judicata mandates that, once a final order is entered, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of transactions, out of which the action arose." *Jones v State Farm Mutual Auto Ins Co*, 202 Mich App 393, 397; 509 NW2d 829 (1993), mod on other grounds *Patterson v Kleiman*, 447 Mich 429 (1994), quoting 1 Restatement Judgments, 2d § 24, p 196. Moreover, as our Supreme Court has repeatedly observed, "[r]es judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Sewell, supra* at 575. Here, the facts and evidence filed, including the deposition testimony and documentary evidence, are identical for both actions. The only difference is that, arguably, sales figures would have been different in the two actions. However, clearly, a declaration of the parties' rights under the contract could have been decided based on the facts presented in either case. Furthermore, given the broad view of res judicata adopted by our courts, the facts and

⁴ For example, in the first complaint, plaintiffs also included additional theories of recovery. Also, in the second complaint, plaintiffs requested declaratory relief, presumably to ensure that defendant will continue to make payments until October 2003.

events are not sufficiently different between the two causes to preclude the application of the doctrine.⁵

B. Effect of Mediation Acceptance

Defendant argues that the issue of future damages was resolved when plaintiffs accepted the mediation evaluation in the summer of 1999.⁶ Plaintiffs maintain that the claim was not

⁵ We reject plaintiffs' contention that they could not request "future payments" because the disputed contract is an installment contract. In general, an installment contract is characterized by periodic payments over time. See *HJ Tucker and Associates, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999). Under such contracts, "[e]very periodic payment made that is alleged to be less than the amount due . . . constitutes a continuing breach of contract and the limitation period runs from the due date of each payment." *Id.*, quoting *Harris v City of Allen Park*, 193 Mich App 103, 107; 483 NW2d 434 (1992). However, another characteristic of installment contracts is "an aggregate amount of money due at some point, even though the contractor/pensioner is not entitled to all of it at any one time." See *HJ Tucker, supra* at 578-579 (Markman, J., concurring). As explained by the Texas Supreme Court in *FD Stella Products Co v Scott*, 875 SW2d 462, 466 (TX, 1994):

The essential feature of a divisible contract is that a portion of the price is set off against a portion of the performance; therefore, when a part of the performance has been rendered, a debt for that part immediately arises. 6 Williston on Contracts, § 861 (Walter H E Jaeger ed., 3d ed. 1962). An installment contract under which the monthly payment is for a portion of the goods received is a classic divisible contract. So too is a lease, in which a month's use of the lessor's property is set off by a month's worth of rent.

Furthermore, "[a] provision in an entire contract for payment in installments, which installments are not referable to severable items or portions of the performance but are referable to the performance of the whole, does not render or characterize such contract as severable." 17A Am Jur 2d, Contracts, § 420, p 445.

Here, while the contract provides for periodic payments for certain unspecified "air system" components, there is no aggregate amount contemplated and the payments are not referable to portions of performance, but to the performance as a whole. In other words, at the outset, plaintiffs granted defendant the use of certain existing inventions and anticipated technology without agreeing to a specific aggregate price or value. Unlike a traditional installment contract, this agreement did not contemplate that a portion of the price would be "set off against a portion of the performance" or that a debt would arise after part of the performance was rendered. Rather, plaintiffs licensed (and later transferred total ownership of) the inventions to defendant and defendant agreed to reimburse plaintiff over time, based on future sales. Accordingly, there was no periodic pay for periodic benefit as in classic installment contract situations.

⁶ In support of this argument on appeal, defendant has submitted a copy of plaintiffs' mediation summary. We observe that, not only is this an improper attempt to enlarge the record on appeal, the mediation rules preclude parties from introducing mediation summaries as evidence in any court. See *Quinto v Cross and Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996); MCR (continued...)

resolved in the first action *because they did not request future damages at mediation* and the mediators did not award future damages. Plaintiffs submitted the affidavits of two of the mediators in which they stated that “[t]he panel expressed its belief to the parties that, notwithstanding Plaintiffs’ request, the panel was unable to render an award for future damages.” (Emphasis in original and emphasis added).⁷ The affidavits both support and undermine plaintiffs’ argument; the affidavits state that plaintiffs requested future damages at mediation, but that the ultimate mediation award may not have included future damages.

However, notwithstanding the affidavits, the mediation evaluation specifically awarded plaintiffs “[\$]250,000 . . . for all claims.” Importantly, the award does not contain a qualification or limitation regarding past or future damages. Furthermore, nothing in the award indicates that the mediators only granted damages through April 1999. Though plaintiffs’ *acceptance* indicates that the award does not include future damages, as the trial court noted in its opinion and order, under MCR 2.403(L), a party must either accept or reject all claims in their entirety. Moreover, under MCR 2.403(M)(1), the trial court’s dismissal of the action “shall be deemed to dispose of all claims in the action” Plaintiff sought future damages in the first action and the dismissal after acceptance disposed of all claims in the action.

We are also persuaded that *Cam Construction v Lake Edgewood Condominium Assoc*, 465 Mich 549; 640 NW2d 256 (2002) compels this conclusion. In *Cam*, after the parties accepted a mediation award, the plaintiff attempted to appeal a prior summary disposition ruling. *Id.* at 553. Our Supreme Court held:

The language of MCR 2.403(M)(1) could not be more clear that accepting a case evaluation means that *all claims* in the *action*, even those summarily disposed, are dismissed. Thus, allowing bifurcation of the claims within such actions, as plaintiff suggests, would be directly contrary to the language of the rule. [*Cam*, *supra* at 556-557.]

Based on the unambiguous language of MCR 2.304(M)(1), our Supreme Court rejected the proposition that a party may except a claim from mediation and it overruled case law that allowed parties to show that they submitted less than all claims to mediation. *Id.* at 556-557. Though procedurally distinguishable from this case, *Cam* clearly supports our conclusion that plaintiffs’ acceptance of the mediation award and the court’s dismissal under MCR 2.403(M)(1) prevents plaintiffs from relitigating issues they argue were not submitted to the mediation panel.

We further observe that the dispute regarding the scope of the award arose before plaintiffs accepted the award and before the trial court entered final judgment. Rather than accept the award, plaintiffs could have moved to have the claim re-evaluated or moved to set aside their acceptance. Plaintiffs’ failure to do so and their choice to, instead, initiate another action frustrates the purpose of the res judicata doctrine, “to ‘relieve parties of the cost and

(...continued)

2.403(J)(4). Accordingly, we have not considered the evidence.

⁷ We note that, while MCR 2.403(J)(4) prohibits parties from introducing “[s]tatements by the attorneys and the briefs or summaries” from a mediation evaluation, it does not specifically prohibit the submission of affidavits like the ones plaintiffs filed in this case.

vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.” *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999), quoting *Hackley v Hackley*, 426 Mich 582, 584; 395 NW2d 906 (1986).

Because plaintiffs’ breach of contract claims were resolved in the first action, plaintiffs’ second action was barred by res judicata and defendant was entitled to judgment as a matter of law. Further, were we to find that plaintiffs failed to assert their right to future payments in the first lawsuit, they clearly could have and should have sought a declaratory judgment in the first case to establish their rights under the contract. Accordingly, we reverse the trial court’s denial of defendant’s motion for summary disposition under MCR 2.116(C)(7), we vacate the trial court’s subsequent orders and remand for entry of summary disposition for defendant.⁸

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens

⁸ Because we conclude that the trial court should have dismissed this action under MCR 2.116(C)(7), we do not consider the merits of defendant’s claim that the trial court erred by granting plaintiffs’ motion for summary disposition under MCR 2.116(C)(10).